



State of Idaho

DEPARTMENT OF WATER RESOURCES

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DIRK KEMPT HORNE
Governor

KARL J. DREHER
Director

June 19, 2003

Roy E. Crawford
Heller Ehrman White & McAuliffe, LLP
333 Bush Street
San Francisco, CA 94104-2878

Dear Mr. Crawford:

Water District 34 routed your letter regarding futile call doctrine, dated June 13, 2003 to the Department's attention. In your letter, you inquired about the definition of a futile call, and the application of futile call doctrine in Water District 34. This issue has been addressed in the Water Distribution Rules for Water District 34 (IDAPA 37.03.12) and in the General Provisions for Basin 34, which were decreed in the Snake River Basin Adjudication on May 8, 2001. The 2000 Supplemental Director's Report for Basin-Wide Issues 5-34, dated March 27, 2000, provides additional clarification of the Department's interpretation of the General Provisions. A copy of the General Provisions is attached for your reference.

The Water Distribution Rules for Water District 34 state that, when curtailment of junior upstream surface water rights will not make water available for delivery and use to senior downstream surface water rights, without unreasonable waste as determined by the director, the watermaster will not curtail the junior water rights in a futile effort to deliver water to the senior rights (IDAPA 37.03.12.020.04). As stated in the 2000 Supplemental Director's Report, the holders of water rights diverted upstream of Mackay Reservoir bear the burden of proving that a call on their water rights by downstream water users is futile.

In Water District 34, the issue of whether or not water upstream of Mackay Reservoir can physically be delivered to downstream water users has been addressed in General Provisions 6a and 6b. These provisions define when water rights upstream of Mackay Reservoir are to be administered separately from water rights below the reservoir, based on flow measured at the Howell Gage. When neither General Provision 6a nor 6b is in effect, the river is considered to be hydraulically connected. As stated in the 2000 Supplemental Director's Report, general provisions 6a and 6b provide a methodology that IDWR and the watermaster can use for the efficient administration of water rights in the Big Lost River basin in lieu of attempting to determine whether a particular call for delivery of water is futile. These provisions provide for efficient administration of the water rights by defining whether the flow conditions constitute a futile call, thereby making it unnecessary for the watermaster to make a determination on a trial-and-error basis each time a delivery call is made.

In response to calls from water right holders downstream of Mackay Reservoir, the Department has directed the Watermaster to apply the same priority cut date to water users above and below Mackay Reservoir when neither General Provision 6a nor 6b is in effect.

General provision 6c addresses use of measurements at the Pence Bridge on the Big Lost River and the Donahue Bridge on Parsons Creek to assist in making futile call determinations. The watermaster has been collecting staff gage data at these bridges. Data reported between June 12 and June 16 does not support a futile call determination. Please note also that these

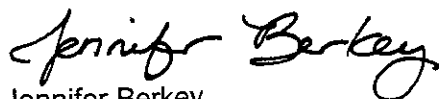
futile call determination made based on the flow at these bridges would not apply to your water rights, which are diverted from Warm Springs Creek.

You also requested data regarding the amount of water that would be shut off and a list of downstream water right holders that would receive water delivery because of the curtailment of rights with a priority date after 1904. When the priority cut date is changed, the amount of water that will be shut off and the specific senior water rights downstream that would be delivered as a result will vary depending on the priority cut date both before and after the change. As an example, I will address the question using the amount of water delivered on the date of your letter, June 13, 2003. In this example, an estimated conveyance loss of 36 percent was used to calculate the amount of water delivered to senior water rights downstream of Mackay Reservoir. This value is based on the average losses observed downstream of the 2B Gage between June 1, 2003 and June 15, 2003. The following example assumes that the river is hydraulically connected and all water users have called for their water rights to be filled. This example also assumes that the amount of natural flow available to allocate remains constant.

Data provided by Water District 34 indicates that on June 13, 2003, a total of approximately 304 cfs were diverted from Parsons Creek, Warm Springs Creek, Pole Stackyard Creek, and the Big Lost River upstream of Mackay Reservoir and that approximately 404 cfs of natural flow were diverted below the reservoir. According to data extracted from the Department's water rights database, these delivery amounts correspond to priority cut dates of 5/1/1916 above the reservoir and 6/1/1890 below the reservoir, if all water rights have been called for delivery. In order to remedy this discrepancy between priority cut dates, the watermaster would need to curtail diversions above the reservoir to a total of 105 cfs and deliver 531 cfs of natural flow to diversions below the reservoir. This would correspond to a priority cut date of 6/1/1896 applied to diversions both above and below the reservoir. This action would curtail 199 cfs of water diverted above the reservoir, and increase delivery of water below the reservoir by approximately 127 cfs. The water rights below the reservoir that would be delivered because of this action would include the water rights with priority dates between 6/1/1890 and 6/1/1896, assuming that the amount of natural flow available to allocate remains constant. In this example, water rights with a 6/1/1896 priority date would only receive a percentage of their diversion rate. A list of these water rights is attached for your reference.

In general, the amount of natural flow available to allocate does not remain constant, but fluctuates daily. The actual conveyance losses and the number of water users calling for their water rights to be filled may also change on a daily basis. All of these factors will affect the amount of water that will need to be curtailed and the specific downstream water rights that would be delivered as a result of the curtailment.

Sincerely,



Jennifer Berkey
Water Distribution

Attachments

cc: Bob Duke, Watermaster, Water District 34

WATER RIGHTS DIVERTED FROM THE BIG LOST RIVER BELOW MACKAY RESERVOIR
WITH PRIORITY DATES BETWEEN 6/1/1890 AND 6/1/1896

34-00518	34-00289	34-00275	34-00880
34-00262B	34-00708A	34-00910	34-10415
34-00394C	34-10190	34-00086	34-00620B
34-00394A	34-00678A	34-00849A	34-10524
34-00394B	34-00708B	34-00082C	34-00088
34-00165B	34-10744	34-00082D	34-00299
34-00165A	34-00493B	34-00122	34-00615
34-10102	34-10714	34-00383A	34-00622C
34-00738C	34-00449	34-00067	34-00620A
34-00738B	34-00436	34-00383B	34-10129
34-00504B	34-00555	34-00894B	34-00710A
34-00504A	34-00312A	34-00894C	34-12369
34-00738E	34-00312B	34-00230	34-10070
34-00738D	34-00852C	34-10292	34-10784
34-00040	34-00318	34-00015	34-00496A
34-00728	34-00788	34-00709B	34-00387C
34-00169D	34-00840	34-00709A	34-00387D
34-00169C	34-00645	34-00825	34-00387E
34-00621B	34-00163	34-00386C	34-00387F
34-00621C	34-00875B	34-00386D	34-00387G
34-00621D	34-00428A	34-00386E	34-00622A
34-00621E	34-00428C	34-00386F	34-00622D
34-00418B	34-00428D	34-00386G	34-10032
34-10478	34-00875A	34-00887	34-00506D
34-00789	34-00790B	34-00354	34-10949
34-00925B	34-00790C	34-00121A	34-00496B
34-00798	34-00790D	34-00115	34-10750
34-00925A	34-00712A	34-00663B	34-00897
34-00218A	34-00712B	34-00416	34-00823
34-00218B	34-00229	34-00663A	34-10872
34-00014	34-00830A	34-00249B	34-00121B
34-00451C	34-00830B	34-10131	34-00901
34-00451D	34-00225	34-00620C	34-00753
34-00605D	34-00320A	34-00249A	34-00680B
34-10908	34-00320B	34-10874	34-00680A
34-00605A	34-00381C	34-00926	
34-00493A	34-00381D	34-00501	